Concrete Pipe & Products Co., Inc. *and* Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO. Case 20-CA-16270

26 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 15 June 1982 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief; both the General Counsel and the Union filed cross-exceptions and supporting briefs respectively; and the Respondent filed an answering brief to the cross-exceptions.

By Order dated 30 August 1983, the National Labor Relations Board remanded the proceeding to the judge for further findings with respect to the credibility of the witnesses and the weight of the evidence as a whole with regard to the consideration of the 19 May 1981 collective-bargaining meeting between the parties.

On 19 December 1983 the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief to the supplemental decision, and the General Counsel submitted a letter in support of the judge's supplemental decision and in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the initial decision and supplemental decision and the record in light of the exceptions and briefs filed with respect to both decisions and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent and the Union were parties to a collective-bargaining agreement effective 20 October 1977 until 19 October 1980. The parties began negotiations for a new agreement 2 October 1980. During negotiations the Union commenced a strike, which ended on 27 October 1980. The parties met again on 28 and 29 October 1980, but agreement was not reached. Bargaining did not resume thereafter until 15 April 1981.[2] The last meeting between the parties was held on 19 May.

During the brief strike in October 1980 the Respondent hired some permanent replacements for striking employees. On 29 October 1980 the parties discussed whether these replacements would remain in the Respondent's employ or whether they would be laid off when the new contract was signed. The Union sought reinstatement of strikers who had been replaced. The Respondent would not yield to that demand. Business agent Allen angrily announced that the replacements would be charged an initiation fee of $1000. On the evening of 29 October 1980 the Respondent's attorney and collective-bargaining representative Murphy sent the Union a mailgram changing its contract proposal to indicate that the Respondent would not agree to a union-security clause unless the Union charged the same fees and dues for all employees. However, the Respondent did not indicate objection to the concept of a union-security clause as such, only that it desired to protect the Company and its employees.

When negotiations resumed on 15 April, Allen retracted his remarks regarding the $1000 initiation fee and stated that fees would be the same for all employees. Murphy then raised two other issues concerning matters that had transpired during the hiatus in negotiations. One issue related to employees who had stopped paying dues and/or had revoked dues checkoff. The other issue concerned internal union charges filed against employee Salinas, who had resigned from the Union and apparently had circulated material designed to "disaffiliate" the Union. Both Allen and Hoover, the Union's district representative and a collective-bargaining representative at the negotiations, told Murphy that the Salinas matter was not a mandatory subject of bargaining and would not be discussed. Allen similarly told Murphy that the issue of employees who canceled dues checkoff was not an appropriate subject for bargaining. Murphy indicated that he did not know whether such matters were mandatory topics of bargaining and stated that he would do research on the question. Hoover also told the Respondent that he had no authority to drop the charges against Salinas or to forgive the dues for individuals who had stopped paying them. He said those matters would have to be taken up with the Union's executive board.

During the the hiatus from April to May, Hoover obtained permission from the Union to drop the charges against Salinas and to forgive 3 months' dues for all employees in the bargaining

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates hereinafter are in 1981 unless otherwise indicated.

unit, including those who had canceled their dues checkoff. However, Hoover never communicated his authority to the Respondent.

At the 19 May meeting, Murphy presented the Respondent's proposed final contract, noting that there had been several changes from the last proposal. The Respondent had withdrawn the union-security clause and had reinserted a "zipper" clause which Murphy had previously said would be removed. Murphy informed the union negotiators that the Respondent would not bargain to impasse on internal union matters raised at the prior meetings, i.e., the Salinas issue, the dues-forgiveness issue, and the fair treatment of striker replacements. Murphy noted, however, that since the union-security clause was a mandatory subject of bargaining, the Respondent was withdrawing it at this time. The union committee caucused and then offered the Respondent a 1-year extension of the expired contract with no wage increase and no changes in the terms of that contract. Murphy rejected the proposal. Allen then indicated to Murphy that the Union was willing to discuss Salinas and the dues treatment of the striker replacements. Murphy would not discuss such matters until Allen assured Murphy that the Union would not bring unfair labor practices charges against the Respondent for discussing the nonmandatory subjects of bargaining. He received such assurances. Allen then explained, as he had at the 15 April meeting, that the striker replacements would be treated the same as other employees seeking membership in the Union. The Union also told Murphy that it would forgive 3 months' back dues for all employees in the bargaining unit rather than just for those who had canceled dues checkoff. Hoover then asked Murphy if he would reinstate the union-security clause if the Union granted the 3 months' dues forgiveness and dropped the Salinas trial. Murphy replied, "That is our intent." The parties then agreed upon a 3-year term for the length of the contract. Allen then announced that the parties had an agreement.

On the evening of 19 May at a union district meeting, Hoover caused the Salinas trial to be postponed indefinitely, and obtained a dues waiver for the entire bargaining unit.[3]

In the meantime, shortly after the negotiation session of 19 May ended, Murphy telephoned the Respondent's corporate headquarters and spoke to its general counsel. Murphy explained to the general counsel that if the matters mentioned above—the Salinas matter, the dues-forgiveness issue, and the striker replacement issue—were worked out, he intended to reinsert the union-security clause in the contract. However, Murphy was then informed that the Respondent's president would no longer accept a union-security clause and was told to inform the Union of that fact immediately. Murphy attempted to telephone Hoover that afternoon, but was unable to reach Hoover until mid-afternoon of the following day, 20 May. On the evening of 20 May, the Union held a ratification meeting. Prior to voting on ratification, Hoover informed the assembled employees that Murphy had told him the union-security clause would be withdrawn from the contract. Hoover informed the employees that he thought the Respondent could not lawfully do that. The contract was then submitted to the membership for ratification and it was unanimously approved. Although the Union asked the Respondent to sign the contract, the Respondent declined to do so.

In his initial decision, the judge found that the Respondent, by its offer, invited the Union to accept a contract with a union-security provision if the Union acceded to the Respondent's requests on the nonmandatory subjects of bargaining. The judge interpreted Murphy's testimony as an admission that the Respondent would reinsert the union-security provision and agree to a contract if the three conditions on those subjects were met. The judge then found that Hoover's act of exercising his authority "to postpone the Salinas trial" and to grant dues forgiveness were the acts of acceptance invited by Murphy. The judge concluded that the Union was not required to notify the Respondent immediately that it had performed the invited act, since the offer did not require such notification. When Hoover had completed his actions, the judge concluded, the Union had accepted the Respondent's offer and the contract was completed. The judge thus found it unnecessary to decide whether a contract had been reached at the 19 May meeting itself, and he thus failed to clarify conflicting credibility issues as to what took place at the meeting.

In his supplemental decision, the judge, as requested by the Board, resolved the outstanding issues of what exactly occurred at the 19 May meeting. The judge concluded that the parties specifically agreed at the meeting that a contract had been reached. The judge found that his credibility findings reinforced his initial conclusions. The judge further found that, although the Union only had begun to drop the Salinas charge, but had not yet formally done so, this fact did not change the result of the case. The judge found that the act of postponing the trial of Salinas was a "significant beginning" in the act of acceding to the Respond-

[3] As noted above the Union had already agreed to treat new hires fairly, and thus no specific action was taken with respect to that issue at the union meeting on 19 May.

ent's request, i.e., dropping the charge. However, the judge found that the Union's actions were interrupted by Murphy, who attempted to revoke his offer of 19 May. He thus found that the Union was stopped from completing the act of performance by the Respondent's interference. Concluding that the Union had significantly changed its position in reliance on Murphy's invitation, the judge found the Respondent was estopped from denying there was a difference between the act of postponing and the act of dropping the charge. He thus again concluded that a contract existed between the parties and that the Respondent violated the Act by failing to sign the contract. For the reasons that follow, we find that no contract had been reached between the Respondent and the Union and thus that the Respondent did not violate the Act by refusing to sign a contract.

Contrary to the judge, we do not believe that the Union's mere postponing of the Salinas matter is equatable with the Respondent's request for the Union to "drop" the charge against Salinas. It cannot be denied that this is a material issue regarding whether there was a contract between the parties. It also cannot be denied that the Respondent desired a completed act from the Union, and not a partial act from the Union. Respondent had no control over dropping the charge; only the Union could have completed the act and put the Respondent to the test of completing the contract by reinserting the union-security clause as the Respondent has promised to do. However, the Union could not put the Company to the test without first performing its part of the bargain. In other words, until the charge was actually dropped per the agreement of the parties at the 19 May meeting the burden did not shift to the Respondent to comply with the terms of the agreement. The Union's retention of control of the charge, while perhaps understandable, nonetheless makes the Union's conduct incompatible with the Respondent's request.[4] The only reasonable conclusion that can be drawn from the facts presented in this case is that the parties had reached a stalemate over contract negotiations. Neither condition extracted by the parties—dropping the charge against Salinas or reinserting the union-security clause—was performed by the appropriate party. In these circumstances, we cannot find that the parties reached agreement on a contract. Accordingly, the Respondent's refusal to sign any agreement did not violate the Act. We therefore will dismiss the complaint in its entirety.

[4] We note that there was no allegation that the Respondent violated the Act by informing the Union that it would no longer accept the union-security clause.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me at Sacramento, California, on March 16, 1982, pursuant to a complaint issued by the Regional Director for Region 20 for the National Labor Relations Board on July 28, 1981,[1] and which is based on a charge filed by Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO (the Union) on May 27. The complaint alleges that Concrete Pipe & Products Co., Inc. (Respondent) has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Issues

Whether on May 19 Respondent and the Union reached a collective-bargaining agreement, and whether on May 20 Respondent repudiated that agreement and thereafter refused to sign it.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is a California corporation engaged in the manufacture and distribution of concrete pipe and related products having plants located in Sacramento. It further admits that during the past year, in the course and conduct of its business, it sold and sent goods and materials valued in excess of $50,000 to customers outside California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Participants*

This dispute arises from an attempt to obtain a new collective-bargaining agreement. The previous agreement was in effect from October 20, 1977, until October 19, 1980. Negotiations for the new agreement began on Oc-

[1] All dates herein refer to 1981 unless otherwise indicated.

tober 2, 1980, and three bargaining sessions were conducted before the contract expired. When it expired, a strike commenced; three more negotiation sessions were conducted while the picketing was in progress. The strike ended on October 27, 1980. Two more bargaining sessions were held on October 28 and 29, 1980. A long hiatus followed but bargaining resumed on April 15, 1981. The last meeting was held on May 19.

Respondent was represented at its negotiation sessions by its plant manager William Street and its attorney Dennis R. Murphy. The Union was represented by business agent Ken Allen throughout the negotiations; he was joined in the 1981 meetings by the Union's district representative Clem Hoover. Other individuals attending on behalf of the Union were Steve Kuster, business representative, Martin Villanueva, steward, and Jack Bohling, steward.

During the brief strike in October 1980 Respondent hired a number of permanent replacements. At the meeting of October 29, 1980, during a negotiation session with a Federal mediator, the parties discussed Respondent's intention regarding whether the replacements would continue to remain employed or would be laid off when the contract was signed. The Union sought the reinstatement of the strikers who had been replaced. When Respondent would not yield to that demand business agent Allen, in anger, announced that the replacements would be charged an initiation fee of $1000. The meeting thereupon ended.

That evening Murphy sent the Union a mailgram changing its contract proposal to say that it would not agree to a union-security clause[2] unless the Union charged fees and dues at the same rate for all employees. The mailgram also stated that Respondent did not object to the concept of union security but would not allow it to be used to punish either the Company or its employees.

B. *The 1981 Negotiations*

Approximately 6 months passed before the next meeting was held. On this occasion, April 15, 1981, Allen told Murphy and Street that his remark regarding the $1000 initiation fee had been made in anger and he had no authority to require such a fee even if he wanted; indeed, he testified that no one in the Union had such authority. He told Murphy that the initiation fee to be charged new employees would continue as before, $92 plus 1 month's dues. Allen's testimony here is corroborated by Hoover and Respondent does not contest it.

During the 6-month gap in bargaining, there had been some other developments. Some of the employees had refused to pay any dues to the Union during this period and others had canceled their dues-checkoff authorizations. In addition, one of the employees, Gerardo Salinas, resigned from the Union and apparently circulated materials designed to "disaffiliate" the Union from Respondent. This resulted in internal union charges being filed against him.

When the April 15 meeting began, Murphy attempted to inject these matters into the bargaining gristmill. Also, at some point during this meeting Allen offered to renew the expired contract for 1 year to expire on October 20, 1981, thus having retroactivity to the expiration date of the previous agreement. The Company rejected that proposal. According to Allen, both Street and Murphy opposed the discipline which they believed the Union either had taken or was about to take. It was in this context that Allen told them the $1000 remark had been made in anger and that he had no power to enforce it. Murphy and Street told Allen Respondent wanted to protect Salinas from any internal union charges and Murphy asked how the Union intended to treat employees who had canceled their checkoffs or had stopped paying dues.

Both Allen and Hoover replied that the Salinas matter was not a mandatory subject of bargaining and they would not discuss it. Allen says he did tell them the Union would charge striker replacements the same fees and dues it charged everyone else. He testified he did not promise to take the replacements as members but neither did he say the Union would refuse them admission. With regard to those employees who had canceled their dues checkoffs, Allen likewise asserted that their treatment was not an appropriate subject for bargaining.

Murphy did not know whether those matters were mandatory topics and told them he would research the question. During their discussion of the dues and discipline questions, according to Hoover, since Murphy had said there would be no contract unless the charges against Salinas were dropped and the dues forgiven for those who had canceled their checkoffs, Hoover told the company officials he had no authority to drop the charges against Salinas or to forgive the dues for those individuals. He said those were matters which would have to be taken up with the Union's executive board.

Hoover testified that during the 4-1/2 weeks between the April 15 and May 19 sessions he obtained permission from his superiors within the Union to drop the charges against Salinas and to forgive 3 months dues for everyone in the bargaining unit, not just those who had canceled their dues checkoffs. He did not communicate his having obtained that authority to Respondent. He says, however, that after a caucus during the May 19 meeting these matters were resolved.

There is some apparently critical testimonial conflict about what occurred on May 19. Certainly there is a conflict regarding what occurred; yet, much is not in dispute and the credibility questions are overshadowed by some objective conduct.

Matters which are not in conflict appear to be the following: Respondent submitted a proposal in final form. Murphy told Allen and Hoover there were only two changes from all the matters which had been agreed on up to then. He had (1) withdrawn the union-security clause, explaining Respondent was "protecting" the employees to whom its president had given his word and, (2) reinserted the "zipper clause" which he had previously said he would take out. Allen quotes Murphy as now agreeing that the Salinas and the dues-forgiveness questions were permissive bargaining subjects and Murphy saying he had decided not to take the internal union mat-

[2] The predecessor agreement contained a standard union shop clause.

ters to impasse. Allen remembers Murphy said that Respondent "could not come to impasse on [those matters] but the union security clause was a definite mandatory issue and they were withdrawing it for that reason."

At that point the union committee called a caucus and had a brief discussion. It returned and, according to Allen, again offered to extend the previous agreement for 1 year with no increases and no changes. Once again, Murphy immediately rejected that proposal. Allen then said the committee would agree to discuss the Salinas matter, the intended treatment of those individuals who had not been paying dues and the union membership of the striker replacements. At first, Murphy said he did not want to talk about those matters, but after Hoover promised not to file unfair labor practice charges against Respondent for discussing them, Murphy agreed. At least partial disagreement is seen from this point on.

Allen says he announced that his purpose in discussing these issues was to get an agreement and to get the union-security clause put back into the contract. Recalling that Respondent had asked for 3 months' forgiveness for those individuals who had withdrawn their dues checkoffs, he said the Union would even go further. Not only would the Union forgive those individuals their 3 months' dues, but it would forgive everybody in the bargaining unit 3 months' dues. Allen also proposed dropping the Salinas trial which was pending that evening. Finally, he said the Union would take the striker replacements as members at the normal initiation fee and that each employee would be handled routinely. Hoover corroborates Allen and in some respects so does Respondent's witness Street. They also agreed that there was some discussion regarding how the Union could accomplish those offers. Both union officials testified that those matters would be taken care of at the district meeting that evening for there would be enough executive board members present to authorize it. Hoover conceded that he did not tell Respondent that he had already obtained the authority testifying he wanted to "reserve that prestige for myself."

This, according to Allen, was followed by some small talk regarding a reopener clause scheduled for October. He says they agreed the reopener would be limited to wages only. Hoover then asked Murphy if Respondent would reinstate the union-security clause if the Salinas question and the dues forgiveness were "taken care of." Murphy replied, "This is our intent." At that point, according to both Hoover and Allen, both sides stood up, shook hands, and Allen said, "Gentlemen, we have an agreement."

Murphy agrees that he said it was his intent to reinsert the union-security clause upon resolution of the disputed matters, but puts it in a different context. Yet, both he and Street say that at the April 15 and again at the May 19 meetings the union officials never said they could get the authority to resolve those questions. Both say that the union officials' point of view was at all times "gloomy," doubting that such authority could be granted. They recall Hoover observing that Local 3 was a big union with an unwieldy bureaucracy having policies which could not easily be changed. Murphy says his remark that it was "our intent" to reinsert the union-security clause was made only in the context that if the Union would ever change its mind about Salinas and forgive the dues he would be inclined to reinsert the clause. Both he and Street say the meeting ended on a dour note; no one claimed to have an agreement, and no one shook hands. They recall it as the first meeting which ended noncordially.

Afterwards, the union officials directed the two stewards to call a bargaining unit meeting for the following evening for the purpose of ratifying the contract as perceived by the Union's negotiating committee.

Shortly after the negotiation meeting ended, Murphy telephoned Respondent's corporate headquarters in Richmond, Virginia, and he spoke to its general counsel Alexander Wellford. During the course of that conversation he informed Wellford about the progress of negotiations including telling him, at the very least, that in the event the problems over Salinas, the dues forgiveness, and the striker replacements were worked out it was his intent to reinsert the union-security clause. He learned, to his surprise, that Respondent's president would no longer accept a union-security clause. Wellford told him to inform the Union immediately. That afternoon Murphy says he attempted to telephone Hoover but was unable to do so. He did not reach Hoover until mid-afternoon the following day.

In the meantime, at the district meeting, Hoover had caused the Salinas trial to be indefinitely postponed pending execution of the contract. He had also exercised his previously granted authority to grant dues forgiveness for 3 months for the entire bargaining unit. The membership of the striker replacements was, as discussed, to be handled in the ordinary course.

On the evening of May 20 the ratification meeting was held. Prior to voting on the ratification, Hoover informed the assembled employees that Murphy had that afternoon advised him that the union-shop clause was being withdrawn from the contract. He told the employees it was his view that Respondent could not lawfully do that. He submitted the contract to them for ratification as he understood it to have been reached the previous day. The membership unanimously approved the contract.

Since that time, following Respondent's contention that no contract was ever reached, Respondent has declined to sign it. It is not clear whether Respondent has complied with any of the terms relating to fringe benefits.

IV. ANALYSIS AND CONCLUSIONS

As can be discerned, there is a credibility resolution which appears to require resolution, at least on first blush. That relates to the disputed versions of what transpired on May 19. The union officials say that after give and take and in order to obtain the reinstitution of the union-shop clause they agreed to drop the charges against Salinas and to forgive the dues of the entire bargaining unit. Indeed, as an additional showing of their efforts to reach a contract they even decided to ignore Respondent's reinsertion of the "zipper clause," something which had not been an issue for some meetings. Re-

spondent's witnesses, on the other hand, say the handling of Salinas, the dues forgiveness, and the membership status of the striker replacements were left hanging tenuously without resolution. Thus, Respondent argues there was no offer and no acceptance.

Yet, implicit in Murphy's testimony is an admission. He concedes that Respondent, before it would reach an agreement with the Union, wanted the Union to drop the Salinas trial, to refrain from collecting dues from employees who were behind in payment, and to treat the striker replacements fairly insofar as initiation fees and dues were concerned. In essence, that was Respondent's offer to the Union. On May 19, when Hoover asked if Respondent would reinsert the union shop clause[3] if those issues were resolved as Respondent wanted, Murphy replied, "That is our intent." I view this exchange as a classic offer/acceptance exchange. Respondent offered a contract to the Union, containing the old union-shop clause upon the Union's, granting Respondent's request to forbear on those three matters. Respondent, by the terms of its offer, invited the Union to accept by the act of acceding to its request. In that circumstance, it was not necessary for the Union immediately to notify Respondent that it had performed the invited act. Governing language is found in 1 Restatement, (2d) of Contracts, 54(1) (1979):

> (1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.

Similarly, see 1, Corbin, "Contracts," 62 (1963).[4]

Thus Hoover's act of exercising his authority to postpone the Salinas trial and grant the dues forgiveness were the very acts of acceptance invited by Murphy. Fair fees and dues treatment of the striker replacements had already been announced (and, in any event, were mandated by law; see Sec. 8(a)(3) of the Act). When Hoover did these things, the Union had accepted Respondent's offer and the contract was completed.[5]

Thus, the General Counsel has proven that on May 19 a collective-bargaining agreement had been reached. It is true that Respondent did not yet know it, but that is of no consequence. When Murphy attempted to revoke the offer the next day, it was too late.[6] Respondent's refusal to sign the agreement thereafter violated Section 8(d) and Section 8(a)(5) and (1). *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

[3] Meaning pars. 04.01.00, 04.02.00, 04.03.00 of the expired agreement.

[4] The Ninth Circuit has said in the context of labor negotiations that the Board is not strictly bound by the technical rules of contracts relating to determining whether or not an agreement has been reached. *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964). It is equally true, however, that contract law principles will govern a determination of offer and acceptance where the facts so warrant. *NLRB v. Donkin's Inn*, 532 F.2d 138 (9th Cir. 1976), cert. denied 429 U.S. 895; *F. W. Means & Co. v. NLRB*, 377 F.2d 683 (9th Cir. 1967). See also *Teamsters Local 524 v. Billington*, 402 F.2d 510 (9th Cir. 1968).

[5] All other issues, including reinsertion of the zipper clause had been resolved.

[6] The Union's decision to have the contract ratified by its membership was not a condition of agreement on which Respondent may now rely to claim the contract was still executory.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action recommended shall include an order requiring Respondent to immediately sign the collective-bargaining agreement and give it retroactive effect including to make whole, where necessary, employees for lost wages and the pension plan for lost premiums. In addition, in the event Respondent did not maintain the health insurance required, it shall make whole any employees who suffer economic loss as a result thereof. Any loss of earnings under the recommended order shall be computed in accordance with the Board's formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be paid on wages in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Interest on the pension plan payments is not required at this stage. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent Concrete Pipe & Products Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at its Sacramento, California plants, excluding office and clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act.

4. At all times material the Union has represented a majority of employees in the bargaining unit described in paragraph 3 above, and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all employees in that unit for the purpose of collective bargaining.

5. On May 20, 1981, by repudiating a collective-bargaining agreement reached on May 19, 1981, to be effective between October 20, 1980, and October 19, 1983, and by refusing thereafter to sign the agreement, Respondent failed in its duty to bargain collectively in good faith within the meaning of Section 8(d) and violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

JAMES M. KENNEDY, Administrative Law Judge. On June 15, 1982, I issued my original decision in this matter. Thereafter all parties filed exceptions with the Board. On August 30, 1983, the Board, in an unpublished order, remanded the case for the purpose of preparing and issuing a supplemental decision "setting forth resolutions of credibility of witnesses, further findings of fact, conclusions of law, and a recommended Order in accordance with the order of remand." By letter of September 8, 1983, I asked the parties if they wished to make further submissions to me, either evidence or argument. In separate replies each party has advised me that it did not intend to do so.

Issues on Remand

The principal incident under scrutiny in this case is what transpired at a collective-bargaining meeting on May 19, 1981. In my original decision I concluded that specific credibility findings were unnecessary. In the context presented therein I found the Union and Respondent had nearly agreed on a new collective-bargaining agreement. Insofar as the contract itself was concerned every substantive item, except for the reinsertion of the union-shop clause, had been agreed to. Both union and management officials testified that Respondent's chief negotiator and counsel Dennis Murphy had stated that it was his "intention" to reinsert the union-security clause, i.e., enter into the contract, if the Union would respond favorably to three requests, each of which were nonmandatory subjects of bargaining as defined by Section 8(d) of the Act.

In my earlier decision I concluded that Murphy's statement constituted an invitation to the Union to accept his offer by complying with those requests.[1] In that circumstance I concluded it was unnecessary to resolve the conflict in testimony regarding the various statements individuals on each side allegedly made during the course of the meeting.

The Board concluded that additional findings with respect to the credibility of witnesses and the weight of the evidence as a whole would be "efficacious in assisting it to reach a determination on the merits of the alleged violations." As I read the Board's Order, it is requiring further explication of two questions. The first is whether the conflicting testimony at the May 19 meeting can be resolved, and, if so, whether it would warrant a different conclusion. The second deals with one of the three requests which Murphy made. In that particular request, Murphy asked the Union to "drop" certain intraunion charges which were then pending against employee-member Gerardo Salinas. In my original decision I found that Salinas' trial had been scheduled to be conducted at a union meeting on May 19, several hours after the negotiation session. I further found that at the union meeting the Union's district representative, Clem Hoover, caused Salinas' trial to be "indefinitely postponed." I concluded from those facts that the Union had "dropped" its charges against Salinas as Murphy had requested. Respondent's exceptions raised, and the Board now asks me to resolve, the question of whether the "indefinite postponement" is the same as "dropping" the charges.

Oddly, it is the prevailing parties, the General Counsel, and the Union which have filed exceptions with respect to the credibility question, not Respondent. Respondent has not specifically challenged my findings of fact with respect to Murphy's statement that it was his intention to reinsert the union-shop clause if the nonmandatory issues were resolved. Rather, its principal contention is that the Union did not resolve the Salinas trial favorably or that if it did, notice of it was not timely transmitted to Respondent prior to Respondent's revocation of the offer. Nevertheless, in compliance with the Board's Order of Remand I shall attempt to resolve those issues.

I. THE CREDIBILITY ISSUE

At the May 19 meeting, according to Union Business Agent Ken Allen, Murphy presented a proposed contract in final form saying that there had only been a couple of changes. He had withdrawn the union-shop clause[2] and had reinserted the "zipper" clause which Murphy had previously said he would remove. Allen recalls Murphy saying that the Company had decided not to go to impasse on the internal union matters (the Salinas issue, the dues-forgiveness issue, and the fair treatment of striker replacements), but since the union-security clause was a mandatory subject, Respondent was withdrawing it.

Allen recalled that the union committee then caucused and afterwards offered Respondent a 1-year extension of the old contract with no wage increases and no changes. Murphy rejected that proposal. Allen then recalls saying that "we" (meaning himself and fellow negotiator Clem Hoover) were willing to discuss Salinas and the dues treatment of the strike breakers. Allen recalls Murphy refused to do so until Allen told Murphy the Union would not bring unfair labor practice charges against Respondent for discussing that issue. Allen says his purpose in raising these matters was to get the union-security clause back into the contract. Once again Allen explained, as he had at the April 15 meeting, that the striker replacements would be treated the same as any other employees seeking membership in the Union. Furthermore, either he or Hoover told Murphy that they would forgive 3 months back dues for the entire bargaining unit rather than just for those who had canceled their dues checkoffs as Murphy had asked. Hoover then asked Murphy if he would reinstate the union-security clause if the Union granted the 3-month dues forgiveness and drop the Salinas trial. Murphy replied, "That is our intent."

Then there was a short discussion with respect to the length of the collective-bargaining agreement and the parties agreed on a 3-year term. Allen recalls that he stood up immediately saying: "Gentlemen, we have an agreement." He says the participants shook hands all

[1] Restatement (2d) Contracts, § 54(1) (1979). I should observe, to obviate confusion, that contrary to Respondent's exceptions, I found a bilateral contract here and relied on the rules for bilateral contracts, not those for a unilateral contract.

[2] The clause had been contained in predecessor agreements.

around and the meeting ended. He remembers the handshaking as being his normal custom when negotiations are successfully concluded.

Hoover corroborates Allen in nearly every respect adding only that he had earlier obtained the authority to grant the dues forgiveness and to drop the Salinas trial. He remembers telling Murphy that those things would be accomplished that evening at the district meeting during which the Salinas trial was to be held. Hoover admits he did not tell anyone the he had already obtained the authority. He testified he did not do so because he wanted to retain "that prestige" for himself. More likely he did not want to give that bargaining chip away before he absolutely had to. Nonetheless, Hoover says he told Murphy that he would ask permission that night to withdraw the charges against Salinas and to waive the dues for the employees for 3 months. He remembers telling Murphy that the zipper clause was not an issue although he asked Murphy if he would "consider" taking it out. Murphy responded he would think about it. Later on, according to Hoover, the union committee accepted the entire proposal with the zipper clause included. He, too, recalls: "I specifically asked Mr. Murphy that if I was able to get the permission from the officers and the executive board members that evening, that if he would reinstate the union-security clause, and that if we had an agreement. And he answered, 'Yes' the first time I asked him. The second time I asked him, he answered that 'That is our intention.'" Hoover says he then explained how the Salinas and dues waiver matters would be handled; then Allen stood up saying, "Gentlemen, we have an agreement" and they all stood up, shook hands, and left.

That evening at the district meeting Hoover caused the Salinas trial to be indefinitely postponed and the dues waiver to be granted for the entire bargaining unit. No specific action needed to be taken with respect to the fair treatment of the new hires.

Allen testified that in his view the Salinas charges had indeed been "dropped." Both he and Hoover observed that Salinas has never been tried on the charges.

In July, according to Hoover, after Respondent had reneged on the contract, the Union's executive board reversed itself, and the Salinas matter was again set for hearing. He says, however, the letter drafted to that effect was never delivered to Salinas.[3] By that time, of course, the instant charge had been filed and Respondent was pursuing the matter through litigation. The executive board in September placed the matter "into abeyance pending the outcome of the instant unfair labor practice proceeding."

Hoover testified that if Respondent had signed the agreement of May 19 the charges against Salinas "would no longer be pending."

Union steward Martin Villanueva, a member of the negotiating committee who attended both the April 15 and May 19 meetings, generally corroborated Allen and Hoover. He, too, recalls the parties standing up and shaking hands. He also remembers Hoover saying he would take the Salinas matter to the "board" that night and cancel the trial. Furthermore, he remembers that at one point Murphy said the Union's 3-month dues-forgiveness proposal was acceptable. Villanueva testified that when the union officials advised Murphy and Plant Manager William Street that the three issues would be resolved, Murphy "kind of just shook his head and had to agree with it" and Street sat up at his desk with a "surprised look on his face."

Street and Murphy's recollections are somewhat different. Street testified that the Salinas matter and the striker replacements question was brought up by Murphy but "The Union's response was that there was not much chance in that having occurring [sic], that they would have to go to an executive board, the executive board was really out of their control, that they had no influence. They told us the magnitude of Local 3, how large of a Union it was and pessimistic that it would be approved." Street says the only thing which was discussed with respect to the union-security clause was that toward the end of the meeting, as they were leaving, Hoover asked Murphy, "If we can resolve these issues, would you put the union security clause back in?" Murphy replied, "That, in effect, is our intention." Street denies there was any discussion regarding when the union officials would present these questions to the executive board. Furthermore, he says, they did not indicate what their next step would be or when. He said the union officials did not say what they intended to do about Salinas and denies there was any discussion regarding the trial scheduled for that evening.

Murphy testified that between the April 15 and the May 19 meetings he had researched the issue of union discipline and amnesty and had learned, as contended by the Union, that such matters were permissive bargaining subjects. He also said he had learned that "[NLRB] cases say that one can adjust to refusal to discuss permissive bargaining by adjusting mandatory provisions." So, according to Murphy, he had memorialized all the agreements to date, including concessions by both sides, except for reinserting the zipper clause and continuing to delete the union-shop clause.[4] He says that after he pointed out the changes he had made the union representatives wished to talk about "the amnesty issue." Murphy says he replied he did not want to do that for he did not wish to risk being charged with an unfair labor practice for going to impasse on a nonmandatory subject. He says that the union officials, without identifying which one, told him, "maybe we can make some accommodations with respect to dues." He testified: "They talked about terminating dues for 3 months or some other alternatives, none of which were ever agreed upon." He editorialized that the 3-month-dues forgive-

[3] Although the letter was mailed, it was returned by the post office. Hoover says it was never delivered thereafter.

[4] The latter had been removed by Murphy's mailgram of October 29, 1980, in response to Allen's threat to charge striker replacements excessive initiation fees. In it Murphy had said, however, that Respondent did not oppose the union-shop clause so long as it was not used to punish Respondent or its employees. As noted, at the April 15 meeting Allen apologized for his outburst and said the replacements would be treated fairly.

ness was insufficient because a number of employees had not paid dues for 5 months.

Murphy also said that, as far as the $1000 initiation fee was concerned, Allen had told him the Union did not intend to impose it. When Murphy asked Allen how he could be sure, Allen replied, "You'll have to take my word for it." Murphy says he then asked about Salinas but the union officials told him that Salinas was their business and they would take care of that. Murphy contends Hoover told him, "This is out of our control, it's a matter of the executive committee." He says Hoover asserted that the Union was so large it could not quickly take a position on such questions.

At that point a caucus occurred. Murphy testified that on their return one of the union officials "basically said, 'We don't know if we can get amnesty for these people and resolve these questions, but if we can, would you put union security back in?' And I was under the impression that they said, 'would you be inclined to,' and I said, 'yes,' meaning I would be inclined to. But we indicated we would seriously consider putting [the union-security clause] back in." Murphy went on to say that there was a discussion about whether the zipper clause could once again be deleted but it was not resolved.

Murphy says the meeting then ended; it was the first meeting which had ended without a handshake. He testified, "As the meeting left, I was under the impression that they were going to seek out amnesty and resolve these issues, but they were pessimistic that they could solve them and if they were going to end."

Thereafter, as described in my original decision, the union officials began taking steps to comply with Murphy's request with respect to all three issues, although the fair dues treatment of striker replacements really needed no action. In the meantime, according to Murphy, he telephoned Respondent's headquarters in Virginia and learned for the first time that Respondent's president would no longer assent to a union-shop clause under any circumstance. It was not until the following day that Murphy was able to telephone Hoover to inform him. Hoover, of course, by that time had obtained the indefinite postponement of the Salinas trial as well as the dues forgiveness for 3 months for the entire bargaining unit. Moreover, he had secheduled a ratification meeting for that evening.

II. RESOLUTION OF THE CREDIBILITY ISSUE

First of all, it is fair to say that although Allen, Hoover, and Villanueva tend to corroborate each other, so do Street and Murphy. There are, of course, testimonial differences. These could be described as the normal, expected differences of memory having nothing to do with probity. They may also be described as deliberate attempts to shade the truth. It is not an easy matter for there are few, if any, objective touchstones from which probabilities may be discerned. Moreover, there is the third possibility that the perspectives of each side were significantly different and that although the meaning of what was said was clear to the speaker, it was not clear to the listener. Indeed, Hoover's testimony that he deliberately withheld knowledge of his special authority to resolve the three issues is an example of the latter. Similarly, if Murphy is to be credited, his testimony that Allen's question was, "Would you be 'inclined' to put the union-security clause back in" rather than a flat acceptance if the nonmandatory issues were resolved, might also be seen as a perception matter, although in fact I do not. I make this observation only to point out that resolution of the credibility questions here is filled with pitfalls. Obviously some of the testimony on each side is believable and other testimony on each side is subject to doubt. Translating that doubt to disbelief, however, is an uncertain business.

Nevertheless, in comparing Street's testimony with that of Murphy, there are a few areas where they are not corroborative. Street had no difficulty admitting to Allen's version that Murphy had told the Union it was Murphy's intention to reinsert the union-secruity clause if the Union would resolve the three questions. Murphy, on the other hand, hedged as described above and did not wish to make that concession.[5] Similarly, Murphy readily admitted that the Salinas matter was discussed, while Street somewhat disingenuously denied there was any discussion of Salinas. He could not recall any discussion of the Salinas trial which was scheduled for that evening. Murphy concedes he was aware of the trial but claims it was not discussed because "it didn't matter that we didn't give a union-security clause. We didn't care what the Union did because Salinas had already resigned from the Union. So it was absolutely irrelevant unless they decided to grant amnesty and whether we were going to put the union-security clause back in. As long as we didn't have a union-security clause in, that's irrelevant."

While Murphy's explanation of the minimal discussion of the Salinas situation is somewhat more credible than Street's disingenuous total denial, nonetheless it gives me pause, to which I shall return shortly.

Yet, in his explanation Murphy admits that he knew Salinas' trial was scheduled for that evening and, since amensty for Salinas was one of the requests Respondent was making to the Union, it seems unlikely that there would be only a little discussion of the Salinas matter as described by Murphy or no discussion as described by Street. The three union witnesses testified at some length that Allen and Hoover told Murphy the Salinas matter could be resolved and could be accomplished that very night. To that extent, therefore, I think it more probable that the Union's version on the point is accurate and that Respondent's is not.

Furthermore, Murphy denies that on May 19 the 3-month-dues forgiveness was ever agreed to, although admitting it was discussed. Yet he does not say he rejected the proposal. Villanueva and Allen have testified that Murphy specifically accepted that proposal. Curiously,

[5] I also observe that a portion of Murphy and Street's testimony seems more likely to refer to the April 15 negotiation meeting rather than the one of May 19. I refer in particular to their reference to Hoover and Allen describing the inability of the Union's executive board to respond promptly to the "amnesty" issues. It is possible, of course, that such a discussion occurred on both occasions, but unlikely in view of the quick response which occurred on May 19. Confusing the two meetings is not limited to Murphy and Street; Villanueva, to a more limited extent, also appeared to confuse them.

Street is silent here. Moreover, under the versions of Allen and Hoover, it appears that Murphy had no real objection to resolution of the question as they suggested; after all, it was a greater dues concession than Murphy had even asked for. Accordingly, it seems to me that Murphy's credibility on the point is less than that of the union officials.

Finally, there is no reason to doubt Hoover and Allen who testified that following the May 19 negotiations they went to the Union's district meeting and proceeded to postpone indefinitely Salinas' trial and to obtain the dues forgivenss. Their conduct here is certainly consistent with their testimony. Had there been no resolution of these issues and had the contract not been at stake, they would not have taken that action.

Demeanor is of little significance here as all five witnesses presented themselves reasonably favorably. Moreover, both the Charging Party's witnesses and Respondent's witnesses displayed some minor and inconsequential testimonial modifications. Murphy was probably the most flawed here, displaying a tendency to editorialize and characterize. Even so, that may simply be a problem inherent with lawyers who testify, unable to separate their advocate self from their testifying self. I tend to doubt that as a reason, however.

I have earlier quoted Murphy's testimony claiming Respondent "didn't care" about Salinas as he had resigned his union membership and what happened to him was irrelevant; unless amnesty was granted, the union-shop clause was out of the contract. Furthermore, Murphy stated early in the May 19 negotiation session that he had, between the April 15 and May 19 meetings, learned that his three "amnesty" concerns (i.e., Salinas, etc.) were nonmandatory bargaining subjects. But, he said, because the union-shop clause was mandatory, he decided, in essence, to go to impasse on it rather than the amnesty issues. He had managed to avoid bargaining for 6 months; was he now willing to engage in sharp practice to gain continued avoidance? His refocus on the union-shop clause as a specific target for impasse suggests he was, considering Respondent's past acceptance of the clause and its October 29, 1980 mailgram.

Combining those two statements with his tendency to hedge with respect to his "that is our intention" statement at the conclusion of the meeting, I find that Murphy's testimony is but an extension of his role as a bargainer. He seeks either no contract or one without a union-shop clause. Thus, rather than testifying factually—for good or ill—he is deliberately playing the advocate's role while a witness. His testimony is colored thereby.

Accordingly, I credit the Union's version here as being more probable than Respondent's version. Moreover, I find significant the discrepancy between Street and Murphy with respect to whether Murphy said it was his intention to give the Union the union-shop clause in exchange for the resolution of the three nonmandatory questions. Street admits to the Union's version; Murphy, however, does so only grudgingly. The concession, of course, leads to the same conclusion I reached in my earlier decision—that there is no real dispute about what was said in this exchange. That, of course, is the precise fact upon which I based my earlier conclusion—that Murphy invited acceptance of his proposal by acceding to the requests. Therefore, to the extent that the credibility resolutions made above have any bearing on my earlier findings, I hold that they simply reinforce them. They are, therefore, reaffirmed. Without question Murphy invited the Union, at the May 19 meeting, to accept his proffered contract with the union-security clause by carrying out the three requests: dropping Salinas' trial, granting dues forgiveness, and fair dues treatment of the striker replacements.[6]

III. THE CHARGES AGAINST SALINAS

At the Union's district meeting on May 19, Hoover, one way or another, caused the Union to indefinitely postpone the charges against Salinas. The trial was scheduled for that meeting; it was never held. Whether Hoover obtained that result by the exercise of powers granted him by the Union's headquarters personnel or whether he persuaded the executive board members present on May 19 to do it is immaterial. Clearly he did it.

Respondent contends, however, that indefinite postponement was not compliance with Murphy's request. It argues that there is a significant difference between "indefinite postponement" and "dropping." I would not, initially, disagree. However, Hoover best described what happened:

> We dropped the—we requested that the charges be dropped and that the trial was not held that evening. At a later date when the Company had reneged on their agreement, then the executive board reversed their position that it would be postponed. That's what happened.

Clearly, the Union had begun to drop the charge. It had indefinitely postponed the hearing—a significant beginning. The act of completion, however, was interrupted not by the Union but by Murphy who attempted to revoke his offer—per instructions from Respondent's Virginia headquarters. Obviously, the Union's next step would have been to complete the act by "dropping" the charges altogether, but was stopped from doing so. When the Union would have completed that step is unclear, as it would be, given the short time frame involved, for Murphy's revocation of the offer came the very next day. The actual dismissal of the charge might have occurred in the few hours before the ratification meeting,[7] immediately afterwards, or a month later. It is speculation to guess. But whenever that moment was to be, Respondent's revocation prevented it from occurring.

Thus, had Allen or Hoover called Murphy and told him on May 20 or thereafter that the trial had been in-

[6] I am unable to resolve the conflicting testimony over the handshake at the end of the meeting. Given the testimony about the manner in which Murphy invited acceptance of the offer, however, I do not believe its resolution essential to the disposition of this case.

[7] There is no evidence that the parties had ever agreed that the contract was conditioned upon employee ratification. On this record ratification appears to be an internal union requirement. Respondent's reference to that occurrence, under this analysis, is simply a non sequitur.

definitely postponed, but not dropped, Respondent might well have responded, reasonably, that the postponement was not the equivalent of "dropping." That, however, did not occur. Instead, Respondent disrupted the process of acceptance before it was completed.

I conclude, therefore, as the Union had significantly changed its position in reliance on Murphy's invitation, that Respondent is now estopped from denying that there is a functional differentiation to be drawn from the two terms.[8]

I observe that the same rule would have applied to the Union, had Respondent signed the agreement, but the Union had nonetheless proceeded against Salinas. In that situation the Union would be estopped from denying that it had dropped the charges, for Respondent would have relied on the "indefinite postponement" as "dropping" and would have changed its position substantially.

I conclude, therefore, that in the circumstances of this case the terms "indefinite postponement" and "dropping" are equatable.

Conclusions

Based on my findings and conclusions as set forth in my original decision of June 15, 1982, and supplemented by my additional findings and analyses herein, I hereby reaffirm in its entirety my original decision, its findings, conclusions, and recommended Order.

[8] Cf., Restatement 2d, Contracts, supra, § 90(1).

Promise Reasonably Inducing Action or Forbearance

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promisee. . . .

Here, of course, Murphy's invitation is the "promise" on which the Union relied. I see, however, no difference between reliance on a promise, to which the Restatement is specifically directed, and the invitation found herein. To the same effect, see Restatement (2d), Contracts, supra, § 139(1).